

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RONDA R. MASTEN,

Plaintiff-Appellant,

v

ABN AMRO MORTGAGE GROUP and  
STANDARD FEDERAL BANK,

Defendants-Appellees.

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UNPUBLISHED

January 23, 2007

No. 261359

Macomb Circuit Court

LC No. 2004-001824-CK

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing her case for failure to appear at a settlement conference. Because the trial court's conclusions were based on erroneous statements by defense counsel, we vacate the trial court's dismissal order and remand for further proceedings consistent with this opinion.

Plaintiff commenced this action after she defaulted on her mortgage payments and was threatened with foreclosure. Her complaint alleges claims for breach of contract, abuse of process, and slander of title. On April 29, 2004, plaintiff obtained a temporary restraining order prohibiting defendants from proceeding with foreclosure proceedings. According to the proof of service in the lower court file, the order was not served on defendants until May 3, 2004. On April 30, 2004, plaintiff's property was sold to defendants at a sheriff's sale.

The restraining order was subsequently dissolved on June 11, 2004. The redemption period for plaintiff's property was due to expire on or about October 30, 2004, and, on October 19, 2004, plaintiff sought another injunction to toll the redemption period. The trial court subsequently entered a stipulated preliminary injunctive order restraining defendants from evicting plaintiff from the premises or from transferring the deed to another party for a period of 30 days in order to allow the parties to reach an agreement.

A settlement conference was scheduled for February 16, 2005. On that same date, a stipulated order was entered allowing plaintiff's attorney to withdraw from the case. Neither plaintiff nor an attorney acting on her behalf appeared at the settlement conference. After confirming that all parties had accepted the case evaluation award and that the case evaluation proceeds had been distributed to plaintiff, and that the only remaining issue was whether the

April 30, 2004, foreclosure sale should be set aside, the trial court dismissed the case for plaintiff's failure to attend the settlement conference.

In dismissing this case, the trial court made several comments. The trial court noted that there was a lack of interest on the part of the parties. The trial court was obviously aware of, and relied on, the history of this case, including plaintiff's appearance without counsel, her failure to respond to discovery, failure to appear at the case evaluation hearing, and belated response to defendants' summary disposition motion. Nonetheless, a significant factor in the trial court's decision was its belief that both parties had accepted the case evaluation. At the February 16, 2005, hearing, the following colloquy took place:

*The Court:* Well, having reviewed the file, and having had a brief discussion off the record with Ms. Neumann, my understanding is both parties accepted case evaluation. The case evaluation proceeds were distributed appropriately to the plaintiff.

*Ms. Neumann:* That's correct, your Honor.

According to the lower court record, however, plaintiff never accepted the case evaluation award. The December 15, 2004, "Acceptance/Rejection Notice" indicates that defendants accepted the \$1,000 case evaluation in plaintiff's favor, but that plaintiff did not respond, and therefore was deemed to have rejected the evaluation. The lower court docket entries also indicate that plaintiff rejected the case evaluation award. Defendants' brief on appeal is authored by the same attorney, Amy Neumann, who represented below that plaintiff had accepted the case evaluation award and received the case evaluation proceeds, but defendants' brief does not respond to plaintiff's assertion that plaintiff rejected the case evaluation award.<sup>1</sup>

The court rules permit a trial court to dismiss a case for failure to appear at a scheduled settlement conference. MCR 2.401(F) and (G); *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998). However, dismissal is a drastic step that should be taken cautiously. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Before imposing such a sanction, the trial court should carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Id.* Factors that a court should consider before imposing the sanction of dismissal are: (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3)

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<sup>1</sup> In her brief on appeal, plaintiff asserts that, at some unspecified point, she returned "unwanted funds." The nature or purpose of these funds is not identified in plaintiff's brief, nor is there any explanation of the circumstances under which any funds were tendered to plaintiff. Plaintiff, who did appear for oral argument, indicated that she never received any funds from defendant. Further, defendants do not address this matter in their brief on appeal. Because of the conflicting information regarding the situation with the case evaluation, this would have been an appropriate subject of inquiry at oral argument; however, defense counsel telephoned this Court on the morning of oral argument indicating that she would not be appearing due to "illness." Thus, this Court was not able to question defense counsel about her false representations made to the trial court concerning plaintiff's acceptance of case evaluation.

prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Id.* at 507.

Initially, we reject plaintiff's argument that the trial court could not properly dismiss this case where, after allowing her attorney to withdraw, it did not afford her an opportunity to obtain another attorney to prosecute her claims. Plaintiff's reliance on *Bye v Ferguson*, 138 Mich App 196; 360 NW2d 175 (1984), is misplaced. In *Bye*, the defendant did not receive notice of his attorney's withdrawal. In this case, plaintiff had notice that her attorney was withdrawing, because she stipulated to his withdrawal. The withdrawal of counsel did not give plaintiff an absolute right to a continuance. *Id.* at 207.

Nonetheless, the trial court erred in dismissing this case, in part, on the basis of an erroneous belief that plaintiff had accepted the case evaluation award. Contrary to the trial court's understanding that all parties had accepted the case evaluation award, the December 15, 2004, case evaluation "Acceptance/Rejection Notice" indicates that defendants accepted the \$1,000 evaluation in plaintiff's favor, but that plaintiff did not respond and, therefore, was deemed to have rejected the evaluation. The lower court docket entries similarly indicate that plaintiff rejected the case evaluation award. On appeal, defendants do not respond to plaintiff's assertion that she did not accept the case evaluation award, but instead argue that other factors support dismissal as a sanction for plaintiff's failure to appear at the settlement conference. However, the imposition of an appropriate sanction was within the trial court's discretion and it is apparent that the trial court's belief that both parties had accepted the case evaluation award, and that the only remaining issue was whether the foreclosure sale should be set aside, was a significant factor in the court's decision to dismiss the case. Because the trial court's decision was influenced by its erroneous belief that the parties had accepted the case evaluation award, we vacate the trial court's dismissal order and remand for further proceedings to allow the court to exercise its discretion whether dismissal, or some other sanction, is appropriate for plaintiff's failure to attend the settlement conference, based on an accurate understanding of the status of the case. *Vincenzo, supra* at 506-507.<sup>2</sup>

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<sup>2</sup> Defendant is correct in its assertions that the trial court had sufficient legal grounds upon which it could have dismissed this matter in its entirety. There is little doubt that but for the false representations of defense counsel regarding plaintiff's acceptance of case evaluations, the trial court would have done so in a legally sound manner. Therefore, our basis for remand is predicated almost exclusively on the false representations of defense counsel to the trial court. On remand, we invite the trial court to decide whether defense counsel intentionally misled the trial court, and if it concludes that defense counsel did so, to take any appropriate action, including, but not limited to, sanctions, assessment of costs and referral to the attorney grievance commission for an investigation. In the event the trial court imposes any monetary sanctions against defendant, those costs must be borne solely by defense counsel.

Lastly, we reject plaintiff's argument that the April 30, 2004, foreclosure sale was voidable because it was conducted in violation of the trial court's April 29, 2004, temporary restraining order. Although a foreclosure sale held in violation of a restraining order renders the sale voidable, *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23; 268 NW 797 (1936), plaintiff failed to show that defendants violated the restraining order in this case.

The restraining order prohibited defendants from continuing with foreclosure proceedings "after receiving actual notice of this order." The proof of service in the lower court file indicates that the order was not served on defendants until May 3, 2004, three days after the foreclosure sale was conducted. Further, the affidavit from David Kreucher, which plaintiff submitted in response to defendants' motion for summary disposition, does not establish that defendants received actual notice of the restraining order before the foreclosure sale. The affidavit merely indicates that Kreucher was retained to deliver the restraining order to the sheriff's office and to defendants' attorney, and that he delivered the order to an unspecified receptionist at an unspecified office on April 29, 2004. The affidavit is insufficient to show that defendants received actual notice of the order. Furthermore, as in *Kuschinski*, laches also bars relief here because plaintiff did not timely move to set aside the sale of the property.

The trial court's February 16, 2005, dismissal order is vacated and the case remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Kirsten Frank Kelly  
/s/ Stephen L. Borrello